INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
1. The background of the litigation	3
2. The proceedings below	5
Argument	7
Conclusion	13

CITATIONS

Cases:	
Alabama Power Co. v. *Ickes*, 302 U.S. 464	8
Allied-City Wide v. *Cole*, 230 F. 2d 827	8
Berman v. *Parker*, 348 U.S. 26	9
Bruszewski v. *United States*, 181 F. 2d 419, certiorari denied, 340 U.S. 865	7
Decatur v. *Paulding*, 14 Pet. 497	9
Gart v. *Cole*, 263 F. 2d 244, certiorari denied, 359 U.S. 978	10
Harrison-Halsted Community Group v. *Housing and Home Finance Agency*, 310 F. 2d 99, certiorari denied, 373 U.S. 914	10
Johnson v. *Redevelopment Agency*, 317 F. 2d 872, certiorari denied, 375 U.S. 915	9
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	8, 9
Pittsburgh Hotels Ass'n v. *The Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186	3, 6

722-208—64

Cases—Continued

Taft Hotel Corporation v. *Housing and Home Finance Agency*, 262 F. 2d 307, affirming 162 F. Supp. 538, certiorari denied, 359 U.S. 967 ..... Page 7, 8, 11

Tennessee Power Co. v. *TVA*, 306 U.S. 118 ... 8

Statutes:

Housing Act of 1959, 73 Stat. 654 4

Housing Act of 1949, Section 106(g), as added by Section 410, 73 Stat. 674, 42 U.S.C. (Supp. IV) 1456(g) 2, 3, 5, 6, 7, 8, 11, 12

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 792

HILTON HOTELS CORPORATION, ET AL., PETITIONERS

v.

ROBERT C. WEAVER, ADMINISTRATOR OF THE HOUSING AND HOME FINANCE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the district court (Pet. App. 2a–3a) is not reported. The opinion of the court of appeals (Pet. App. 1a–2a) is reported at 325 F. 2d 1010.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1963. The petition for a writ of certiorari was filed on January 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Housing Act of 1949, as amended, confers standing upon hotel owners to challenge the approval by the Housing and Home Finance Agency Administrator of a land disposition contract for the construction of a competing hotel within an urban renewal project area.

2. Whether Section 106(g) of the Housing Act of 1949, as amended, has application to urban renewal plans approved prior to the effective date of the Section.

STATUTE INVOLVED

Section 106(g) of the Housing Act of 1949, as added by Section 410 of the Act of September 23, 1959, 73 Stat. 674, 42 U.S.C. (Supp. IV) 1456(g) provides:

> No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this subchapter shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing.

STATEMENT

By this action, filed in the United States District Court for the District of Columbia, petitioners seek to prevent the construction of a motor hotel on prop-

erty owned by the Pittsburgh, Pennsylvania, Urban Redevelopment Authority through a mandatory injunction requiring the respondent, the Administrator of the Housing and Home Finance Agency (HHFA), to withdraw his approval of the project. Petitioners, corporations owning hotels in Pittsburgh, assert that this approval was in violation of Section 106(g) of the Housing Act of 1949, as amended, *supra*, p. 2.

In *Pittsburgh Hotels Ass'n* v. *The Urban Redevelopment Authority of Pittsburgh*, 309 F. 2d 186 (C.A. 3), these same petitioners advanced the same contentions in an endeavor to enjoin local Pittsburgh officials and private developers from proceeding with the construction of the same motor hotel. The HHFA administrator was not named, however, as a party defendant. The District Court for the Western District of Pennsylvania entered summary judgment against petitioners (202 F. Supp. 486) and the Third Circuit affirmed. It held that petitioners lacked standing to maintain the action, and, further, that, in any event, the provisions of Section 106(g) requiring an independent analysis of local transient housing and a determination of need for additional hotels prior to hotel construction on urban redevelopment property were not applicable to the construction project in issue. This Court denied certiorari, 372 U.S. 916.

1. *The background of the litigation.* The relevant facts are not in dispute and are recited in the Third Circuit's opinion in the earlier case, which is reprinted in the appendix to the present petition (pp.

3a–11a). In 1952, the Federal Housing Administration entered into a contract with the Pittsburgh Urban Redevelopment Authority (the Authority) in which it agreed to advance funds to the Authority for the purpose of making surveys and plans for a redevelopment project in Pittsburgh. In 1955, the Pittsburgh City Planning Commission completed a plan for the proposed redevelopment of a 46 block area in the Lower Hill district. The plan divided the land into areas on a use basis (*e.g.*, commercial, cultural, recreational, educational and residential) and provided that the redeveloper was to devote the land to the uses specified in the Plan for each area (Pet. App. 4a–5a).

With respect to the area designated for commercial use, the Plan specifically included hotels in the list of permitted buildings, subject to another proviso which limited the height of any constructed building or structure to two stories or twenty feet. The Plan was expressly subject to modification at any time upon approval by specified city bodies, including the Authority (Pet. App. 5a).

The Plan was approved by the Pittsburgh City Council in July 1955 and, three months later, the Authority and HHFA entered in a Loan and Grant Contract pursuant to the Housing Act of 1949, as amended, under which financial assistance was to be provided to the Authority. The contract recited the approval of the Plan by HHFA and the contemplation of the parties that there would be periodic modifications (Pet. App. 5a–6a).

The Housing Act of 1949 was further amended by the Housing Act of 1959, 73 Stat. 654. Section

410 of that Act amended Section 106 of the 1949 Act by the addition of subsection (g), *supra*, p. 2. The new subsection conditioned the inclusion in an urban renewal plan of provisions permitting the future construction of hotels or other housing for transient use upon a determination by the community, following a "competent independent analysis of the local supply of transient housing," that a need existed for additional units of such housing in the renewal area.

Thereafter, on September 27, 1960, Modification No. 2 of the Plan was approved, removing a street from Parcel "B", which was designated for commercial use. Two private redevelopers then formed a corporation known as Golden Triangle Motor Hotel, Inc. The corporation sought and obtained from the Authority a six-month option to enter into a 99-year lease to redevelop the formerly designated street area by building an eight-story motor hotel. The proposed redevelopment of Parcel "B" was approved by the respondent as Administrator of the Housing and Home Finance Agency. No independent analysis of the local supply of transient housing has been made (Pet. App. 7a).

2. *The proceedings below.* As heretofore noted, petitioners (in conjunction with a hotel association and two other corporations owning hotels in Pittsburgh) first unsuccessfully endeavored to enjoin the construction of the motor hotel in Parcel "B" by a suit in the Western District of Pennsylvania against the Authority, the city and the private developers. On February 5, 1963, less than two weeks before this Court denied certiorari to the Third Circuit, the

present suit was instituted in the District Court for the District of Columbia against the HHFA Administrator. Based upon the same claim of a violation of Section 106(g) of the Housing Act of 1949, as amended, the complaint sought to compel the Administrator to withdraw his approval of the Authority's proposed lease of land to Golden Triangle Motor Hotel, Inc.

The district court dismissed the action on the ground that petitioners lacked standing, adopting the reasons set forth by the Third Circuit in the *Pittsburgh Hotels Association* case, which it pointed out involved "the same facts and legal issues" (Pet. App. 2a–3a). The District of Columbia Circuit affirmed. It noted in its *per curiam* opinion (Pet. App. 1a–2a):

> This case raises issues of fact and law virtually identical to those which were considered by the Court of Appeals for the Third Circuit in *Pittsburgh Hotels Association, Inc.* v. *Urban Redevelopment Authority of Pennsylvania*, 309 F. 2d 186 (1962), cert. denied, 372 U.S. 916 (1963). The parties there were substantially the same as those now before us, though relief here is sought against a Federal official, and there was sought against private parties and state officials. If the present appellants had obtained in the Third Circuit the relief they there sought, the controversy would have been effectively concluded. We are satisfied that in the interests of comity and the orderly administration of justice we should not attempt to reexamine the matters considered and resolved by the Third Circuit, a court having authority equal to our own.

ARGUMENT

This is the second attempt by these petitioners to obtain a judicial declaration that, in the absence of an independent analysis of the local supply of transient housing in the city of Pittsburgh and a determination of need for additional hotels, the approval of hotel construction on urban redevelopment land violates Section 106(g) of the Housing Act of 1949, as amended, *supra*, p. 2.

As the court below readily perceived, there is no compelling reason why petitioners should be permitted to relitigate the issues which were resolved adversely to them in the prior action brought in Pennsylvania. In any event, the Third Circuit correctly held in the alternative (1) that petitioners lacked standing to sue and (2) that the provisions of Section 106(g) were not violated. There is, accordingly, no more warrant for review by this Court now than there was when certiorari to the Third Circuit was denied just one year ago.[1]

1. The decision of the Second Circuit in *Taft Hotel Corporation* v. *Housing and Home Finance Agency*, 262 F. 2d 307, affirming 162 F. Supp. 538 (D. Conn.), certiorari denied, 359 U.S. 967, applied to administrative action under the Housing Act of 1949 the well-settled principle that standing to sue is not present

[1] The court below expressly declined to decide whether, in view of the prior action, the present suit was barred by principles of *res judicata* and collateral estoppel. While we think this Court similarly need not reach the question, in the event that certiorari is granted we reserve the right to urge that this action was so barred. Cf. *Beauzowski* v. *United States*, 181 F. 2d 419 (C.A. 3), certiorari denied, 340 U.S. 865.

merely because a person may sustain economic loss through competition made possible by federal aid.[2] In that case, as in the prior action here, the owner of an existing hotel was held to lack standing to maintain a suit to enjoin HHFA from furnishing financial assistance to a proposed urban redevelopment project insofar as the project included the erection of a competing hotel.

We do not understand petitioners to challenge the correctness of the *Taft Hotel Corporation* decision, which the Third Circuit followed in the prior action (Pet. App. 8a–9a). Rather, they urge (Pet. 23–24) that Congress, by the subsequent enactment of Section 106(g) of the Housing Act, intended to confer upon hotel owners the standing to complain of federally aided competition which they lacked theretofore.

Section 106(g) does not in terms confer such standing, and petitioners have pointed to nothing in its legislative history which suggests a Congressional intent to permit the maintenance of a suit to enforce its provisions by a hotel owner faced with the prospect of increased competition. Indeed, that history contains no reference whatever to the matter of the hotel owner's standing to complain, despite the fact that, as petitioners themselves stress (Pet. 18), there was undoubtedly a legislative awareness of the *Taft Hotel* decision.

---

[2] See, *e.g.*, *Tennessee Power Co.* v. *TVA*, 306 U.S. 118; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Perkins* v. *Luken Steel Co.*, 310 U.S. 113, 125; *Allied-City Wide* v. *Cole*, 230 F. 2d 827 (C.A.D.C.).

Petitioners are thus forced to rely solely on the asserted fact that the amendment was enacted for the benefit of the class—that of hotel owners—to which they belong. Their argument appears to be that, perforce, the intended beneficiaries of a legislative enactment have standing to require compliance with it. But, as this Court has recognized, it is often the case that one whom Congress has sought to protect, and who in fact will suffer if the legislative mandate is ignored, has no standing to complain. For example, the Court has indicated that the employees of government contractors have no standing to enforce judicially the statutory guarantee of minimum wages. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 131. The reason is that, in the absence of some clear indication that judicial remedies were contemplated, Congress cannot be presumed to have encouraged "'[t]he interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, [which] would be productive of nothing but mischief.'" *Id.* at 131–132; quoting from *Decatur* v. *Paulding*, 14 Pet. 497, 516. The conclusion that Congress meant to do its own policing is especially justified when the function is one that does not readily lend itself to judicial review. And certainly this is true of urban renewal. See *Berman* v. *Parker*, 348 U.S. 26.

These principles have been consistently applied by the courts of appeals in urban renewal cases. Thus, in *Johnson* v. *Redevelopment Agency*, 317 F. 2d 872 (C.A. 9), certiorari denied, 375 U.S. 915, a group of

residents in an area to be redeveloped s ht to enjoin the local agency from carrying out the proposed project on the ground that it had failed to provide a feasible plan for their relocation, as required by Section 105(c) of the Housing Act of 1949, as amended. The Ninth Circuit held that Congress had delegated the enforcement of that section to the Administrator of the Housing and Home Finance Agency and that the residents of an area to be cleared had no standing to enforce the provisions of the section. See, also, to the same effect, *Harrison-Halsted Community Group* v. *Housing and Home Finance Agency*, 310 F. 2d 99 (C.A. 7), certiorari denied, 373 U.S. 914.

Gart v. *Cole*, 263 F. 2d 244 (C.A. 2), certiorari denied, 359 U.S. 978, is not to the contrary. The Second Circuit there held only that property owners and residents in the area to be redeveloped had standing to challenge the Housing and Home Finance Agency Administrator's refusal to grant them an oral hearing on the feasibility of New York City's relocation plan and his failure to review personally the sufficiency of these plans.

Whereas, there, the question was whether procedures plainly required by the statute had been followed, here the question is whether the Act requires certain findings to be made before approval can be given. More fundamentally, the complaint in *Gart* went to the manner in which the Administrator reached his decision, while here the underlying argument is that satisfaction of substantive criteria relat-

ing to need was a prerequisite to any approval. As we have seen, that question has been uniformly resolved against petitioners' position by the Third, Seventh and Ninth Circuits, as well as by the Second Circuit itself in the *Taft Hotel* case.

2. Petitioners' argument on the merits stands on no firmer footing. As the Third Circuit pointed out (Pet. App. 10a), neither the provisions nor the legislative history of Section 106(g) indicate that it was intended to apply retroactively; *i.e.*, to hotel construction provided for in urban redevelopment plans approved prior to 1959. In this case, the inclusion of a provision for a hotel in the Authority's plan was approved by both local Pittsburgh officials and the Administrator of the Housing and Home Finance Agency almost four years before the effective date of the 1959 enactment.

Petitioners answer (Pet. 19–20) that the actual disposition of land for hotel construction here was not made until after the enactment of Section 106(g) and suggest that prospective application of the section would still require an independent survey of transient housing and a determination of need before the proposed motor hotel may be built. But this assertion is refuted by the plain wording of Section 106(g). Congress could have provided that no hotel was to be constructed unless preceded by the survey and determination of need. Instead, it chose to make these steps a condition precedent only to the *inclusion* of *provisions* in urban renewal plans for the new con-

struction of hotels. This approach indicates a deliberate legislative judgment to avoid interference with already approved urban renewal plans such as that here involved.

3. Contrary to petitioners' assertion, the question as to the application of Section 106(g) to the urban renewal plan here involved does not appear to be of broad, recurring importance. We are advised by the HHFA that the provisions of the Section are being applied with respect to all urban renewal plans approved after the date of its enactment in 1959, as well as those pre-1959 approved plans which were later modified so substantially as to make them virtually new plans. Thus, the statutory construction issue has no prospective significance but is limited in scope to the urban renewal plans approved before 1959 and not substantially changed thereafter.

In this connection, petitioners are mistaken in suggesting (Pet. 14) that prior to the enactment of Section 106(g) it was customary to include in each urban renewal plan a reference to hotels "in the boiler-plate authorization for incidental commercial construction." A random survey recently conducted by HHFA's Regional Office in Philadelphia of 62 urban redevelopment projects in five states (including Pennsylvania) and the District of Columbia disclosed only 14 plans which expressly authorized hotel construction and nine plans which may have impliedly permitted such construction.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
HARVEY L. ZUCKMAN,
Attorneys.

FEBRUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964